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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-294

SAMEIT WESTBULK AND JOHAN HAGENES,
PETITIONERS,

v.

CARIBE SHIPPING CO., INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT

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Respondent opposes petitioners' request of Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit, dated April 14, 1975, and its order of May 29, 1975 denying petitioners' application for a rehearing. Both, judgment and order, are cor-

rect adjudications of the issues presented on appeal, issues that presented questions of local application only to Puerto Rico.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Rule 19.1(b) of the Rules of the Supreme Court. Respondent submits that in view of the limited importance of the questions presented and in consideration of the circumstances of this case, this Honorable Court lacks jurisdiction to issue a Writ of Certiorari.

Question Presented

Respondent respectfully submits that no special or important question of federal law has been presented by Petitioners. The intention of Petitioners is to have this Court substitute its evaluation of the evidence presented at the District Court, disregarding that of the jury and of the two Courts below.

Statement of the Case

Petitioners again insist that the District Court failed to present in its instructions to the jury the alternatives of the *per se* approach and the *factor* approach in the imposition of the contributory negligence of the deceased longshoreman to his stevedore employer. But, they failed to recognize that they did not save their objections to the Court's determination not to give their requested instructions. They were bound by F. R. Civ. P. 51, 28 U.S.C.A., to express their objection *after* the charge, see the Circuit Opinion, 514 F.2d 1214, at 1219, Appendix to the Petition,

pages 28(a) and 29(a). The Petitioners were presented with modified alternatives to their requests for charge number 32 and 33 but they refused to accept them.

The factual setting of the case is amply expressed by the District Court in its opinion, 385 F. Supp. 119, at 121-125.

The posture in which the Petitioners presented their claim for indemnity at the Trial Court was different from that they suggested in their post-trial motions, in their appeal and in this Petition for Certiorari. The indemnity action they consistently argued was going to turn upon the determination by the jury of whose responsibility it was to check the hold prior to it being closed, and this was a position which resulted after plaintiff and petitioners' witnesses failed to convalidate petitioners' theory that the respondent had a duty to count his men after the termination of a day-work.

The respondent's position was at all times that Petitioners had the responsibility of inspecting the hold prior to closing the hatches and that their failure to do so was the proximate producing cause of Alejandro Cerrich's death. This omission or failure to act barred the Petitioners from claiming any indemnity from the respondent, whether the indemnity was due based on the stevedores sub-standard performance or by imposing to him the negligence of the deceased longshoreman.

In this proper posture the case was sent to the jury, there are sufficient facts in the record to justify the verdict of the jury and the determination of both courts below. Petitioners failed to save adequately their objections to the instruction which were properly denied by the Court and cannot at this time assign this as error.

The Facts

Alejandro Cerrich was employed as a longshoreman by Caribe Shipping Co., Inc. (Caribe). On November 9, 1970, Cerrich was aboard the vessel M/V WESTBULK, engaged in the unloading operations in hold No. 2.

After longshoremen returned from lunch, work was stopped due to rain approximately at 2:30 p.m. Around 3:00 p.m. to 3:30 p.m. a signal was blown and the longshoremen were ordered to disembark.

All the longshoremen with the apparent exception of Cerrich, left the vessel after the second signal was blown. The Petitioners admitted that when Cerrich stayed behind he was not anymore in the service of the vessel nor was he engaged in stevedoring services. See Circuit Court's Opinion, 514 F.2d at 1217.

The members of the crew, without making an inspection of the hold, closed the hatches after 4:00 p.m. These vessel's hatches are operated only by her crew members for they are an automatic mechanism. (A. p. 41)

Next day the unloading operations were continued and work on hold No. 2 was completed during the morning. Alejandro Cerrich was later found dead by a member of the crew on the bottom of hold No. 2.

Alejandro Cerrich's widow and daughter filed an action against the shipowner, the Petitioners, who in turn brought an indemnity claim against the stevedore contractor, Caribe Shipping Co., Inc., the respondent.

After a trial, the jury rendered a verdict awarding Plaintiffs $100,800.00 on their claim against the Petitioners. The jury also, rendered a verdict in favor of Respondent and against Petitioners on the indemnity action. By stipulation, the parties had submitted to the jury a special verdict form. The jury found the M/V WESTBULK unseaworthy, also that the Petitioners had been negligent

and that Alejandro Cerrich had incurred in a contributory negligence of 10%. The jury was not required to express what action or conduct by deceased Alejandro Cerrich was found to be negligent.

Petitioners filed motions for judgment notwithstanding the verdict and in the alternative for a new trial. Respondent opposed the motions and requested attorney's fees. Petitioners' motions were denied and attorney's fees imposed upon them.

An amended judgment was entered to that effect and Petitioners appealed from the same. The Circuit Court affirmed and denied a rehearing.

Argument

I. Under the Issue Presented This Court Lacks Jurisdiction Under 28 U.S.C. § 1254(1) and Rule 19.1(b) of the Rules of the Supreme Court.

The sole question presented by the Petitioners although compound, boils down as to whether the comparative negligence of a longshoreman is imputable, as a matter of law, to the stevedore employer; resolving in this fashion automatically the issue of liability and/or indemnity in a third-party action between the shipowner and the stevedore.

It is respectfully submitted that this question is not of special or important federal significance, nor does its adjudication by the courts below entail any conflict with any decision of this Court, or with the opinion of any other Circuit.

The question presented is only of local applicability to Puerto Rico

At 514 F.2d 1216-1217, Note 1, the Circuit Court expressed the legal basis for the third-party actions in

Puerto Rico, the general maritime law applies to actions in the Commonwealth only to the extent consistent with local law. Under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, no action by shipowner against the stevedore for indemnity can be maintained. As this Court has stated in *Cooper Stevedoring Co.* v. *Kople,* 417 U.S. 106, 113, 94 S. Ct. 2174, 40 L. Ed. 2d 694 (19), at Note 6:

> "The intent and effect of this amendment was to overrule this Court's decisions in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L. Ed. 1099, 66 S. Ct. 872 (1946), and Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 100 L. Ed. 133, 76 S. Ct. 232 (1956), insofar as they made an employer circuitously liable for injuries to its employee, by allowing the employee to maintain an action for unseaworthiness against the vessel and allowing the vessel to maintain an action for indemnity against the employer. See HR Rep No. 92-1441, pp. 4-8 (1972); S Rep No. 92-1125, pp. 8-12 (1972)."

In view of these developments, the only court of federal jurisdiction where actions in the nature of a third-party-claim for indemnity based on longshoremen maritime personal injuries can be maintained is in the Federal District Court for the District of Puerto Rico. And this action, as expressed by the Circuit Court, "might survive this change in the general maritime law because specifically authorized by the Commonwealth." See 514 F.2d at 1216-1217, end of Note 1. This was recognized by the Petitioners on their brief to the Circuit Court, page 17 and less emphatically to this Court in their Petition at page 11.

The matter is one of local application to Puerto Rico, rooted as previously expressed on local statute and based

in the special relationship between Congress and the Commonwealth of Puerto Rico. For these reasons, and by analogy, it is of applicability to this case this Court's decision in *Del Vecchio* v. *Bowers,* 296 U.S. 280, 285, 56 S. Ct. 190, 192; 80 L. Ed. 229:

> "In the view that the case does not fall within rule 38 (28 U.S.C.A. following Section 354), the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District. The longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application. We therefore granted the writ because of the important question as to the effect of Section 20(d)."

The certiorari requested by the petitioners should be denied for certiorari jurisdiction "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U.S. 251, 257-258, 36 S. Ct. 269, 271, 60 L. Ed. 629; and Mr. Justice Frankfurter's dissenting opinion in *Rogers* v. *Missouri Pacific Railroad Co.,* 352 U.S. 500, 530-532, 77 S. Ct. 443, 462-463, 99 L. Ed. (1955).

The opinion of the Circuit Court is not in conflict with any applicable decision of this Court

The Petitioners contend that the opinions of this Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic SS Co.,* 350

U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956) and *Italia Societa Per Azioni* v. *Oregon Stevedoring Co.,* 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 73 (1964) present a rule that will not allow the Circuit Court holding that indemnity only lies against a stevedore employer when the actions of his employee are within the scope of employment.

It should suffice to point out that in neither of these two cases the matter now raised by Petitioners was even anticipated, less to say that it was in any way settled.

Both in *Ryan,* 350 U.S. at 126, and in *Italia,* 376 U.S. at 317 the longshoreman was engaged in stevedoring operations. What is clear in both cases is that any breach of the stevedore's warranty must be based upon an agreement between the shipowner and stevedore, see *Italia,* 376 U.S. at 321.

In their citation of *Italia* at page 5 of their brief, Petitioners failed to include the phrase that has been found, even by the Second Circuit, See *Hurdich* v. *Eastmount Shipping Co.,* 503 F.2d 397 (2d Cir. 1974), to be the key to the adjudication of the indemnity action

> "For they illustrate (the considerations) that liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury."

This has come to be known as the *Italia* balancing of interest test.

Petitioners' contention is erroneously premised on the argument that the Circuit Court is injecting a concept of tort law when it requires that the negligence of the longshoreman be in the scope of his employment. This is not so, the doctrine of implied warranty is limited to the contract and only the negligence of the longshoreman that can

constitute in itself a breach of the contractor's warranty of workmanlike performance may be imputed to his employer, *Casbon* v. *Waterman,* 274 F. Supp. 481 (E.D. La., 1967), *Affr.* 417 F.2d 1040 (5 Cir. 1969); See *Morris, Maritime Personal Injuries,* V. 2, 3 Ed., 1975, Sec. 328, p. 111, and cases cited in Note 40. See also Circuit Court Opinion 514 F.2d at 1218 and 1221.

The opinion of the Circuit Court is not in conflict with any opinion of any other Circuit

The Petitioners further argue that a certiorari should be issued because there is a conflict between the positions of the Circuit Courts with relation to what has been called the *per se* and the *factor* approach. The Petitioners contend that this Court should select the *per se* approach, most prominently expounded by the decisions of the Second Circuit cited by Petitioners. A review of the cases decided by all the Circuits will show that the comparative negligence of the longshoreman, committed while engaged in operational activities, will be imputed to his employer. The difference between so-called *per se* approach and the *factor* approach is one of only procedural importance.

It must be also noted *R. A. Martinez* v. *Compagnie General Transatlantique,* 517 F.2d 371 at 375-376 (1st Cir. 1975), where the First Circuit Court has clearly expressed the rule to be that:

> "A stevedore's warranty of workmanlike performance encompasses a promise to provide longshoremen free of negligence . . . . . ." Carillo v. Sameit Westbulk, 514 F.2d 1214 (1st Cir. 1975). In light of that well-settled rule it is difficult to argue that a stevedore has not breached its warranty where it turns out that one of its employees was negligent within the scope of his

> employment. We believe the correct rule is that the plaintiff longshoreman's negligence must be imputed to his employer as a basis for indemnity. Of course, this does not mean that a finding of contributory negligence automatically establishes the shipowner's right to indemnity. The fact finder may still find that there was conduct by the shipowner sufficient to preclude indemnity. See generally Hurdich v. Eastmount Shipping Co., 503 F.2d 397 (2d Cir. 1974)."

A review of the *Hurdich* decision by the Second Circuit at pp. 400-402 can only lead us to the conclusion that there is no actual substantive difference between the approaches. The First Circuit has been the only faced with the necessity of deciding if the negligence of the longshoreman to be imputed to his employer was that incurred in the course of his work, or within the scope of his employment. The position of that Circuit is clear and is not in conflict with any other Circuit or with any applicable decision of this Court.

No error was committed by rejecting Petitioners improper and over-broad request for charges

The Petitioners further compounded their argument by stating that it was error to deny their charges, as previously stated the Petitioners failed to adequately preserve this objection and it was already considered and rejected by both courts below after a review of the evidence presented and an analysis of the posture in which the parties presented their respective cases for adjudication. See District Court Opinion 385 F. Supp. at 124-125 and Circuit Court's 514 F.2d at 1218-1219.

The Petitioners failed to comply with their burden of proof and may not challenge the jury verdict denying indemnity

The Petitioners allege that respondent should have been burdened with the necessity of showing that the decedent's negligence occurred outside the scope of his employment. None of the cases cited in support of that proposition at page 11 of the petition are applicable. And furthermore, the petitioners apparently forget what they argued to the trial court. All the parties and both courts below agree that once the order to stop work was given and longshoremen were ordered to leave the vessel, Alejandro Cerrich was not acting in any way within the scope of his employment.

The Petitioners admitted that after the longshoremen left, the vessel and Alejandro Cerrich stayed behind, he "was not anymore in the service of the vessel." This is only obvious for he "was no longer engaged in stevedoring services." We do not know what actions or omissions were found by the jury to amount to a comparative negligence by the deceased. But the jury could have found from the evidence presented that Mr. Cerrich was negligent in trying to leave the darkened hold and that in this effort he fell to his death, no other possibility seems reasonable from the evidence presented.

After the longshoremen were ordered to stop work, they, according to Petitioners' own expert, "flow" out of the vessel at their own pace and there is no responsibility for counting the men as they leave, this was clearly established by the stevedoring experts that appeared for all parties. If the theory suggested by the Petitioners was correct, that the deceased remained behind to unlawfully appropriate articles from the cargo, then with more reason we can argue that his activities were beyond the scope of

his employment and his negligence cannot be imputed to the respondent, for not even a remote interest on part of the longshoreman to serve his master can be implied. There was no need for the respondent to present any further evidence, the Petitioners, then third-party plaintiffs admitted that any negligence by the deceased longshoreman most probable than not occurred as a result of acts or omissions unrelated to his employment.

II. Petitioners' Own Acts and Omissions Were the Proximate Producing Cause of the Occurrence; and They Are Barred From Requesting Indemnity From the Respondent.

The shipowner's action for indemnity is not founded upon a tort or upon any duty which the stevedore owes to its employees. The action must be based upon any breach by the stevedore of its obligation to perform its services in a reasonably safe manner, see *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic Steamship Corp.*, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956); *Weyerhauser Steamship Co.* v. *Nacinera Operating Co., Inc.*, 355 U.S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491 (1957). The evidence presented during trial clearly showed that the respondent performed its stevedoring operations in a safe and workmanlike manner, and so the jury found, but assuming for argument that some action by the stevedore, prior to his men leaving the vessel the day of the occurrence, including the imputation of decedents' own negligence under the assumption that it was on the scope of his employment, could be taken as a breach of his warranty to the shipowner then we respectfully submit that the shipowner is barred due to its own negligent acts and omissions, from obtaining any indemnity over the stevedore in this case.

If the respondent had rendered a substandard per-

formance, which it did not, the petitioners would have been entitled to indemnity, "absent conduct on its part sufficient to preclude recovery." *Weyerhauser Steamship Co.* v. *Nacinera Operating Co., supra.* The question is therefore, who brought the unseaworthiness into play. *Old Dominion Corp.* v. *Polskie Linie Oceaniczne,* 386 F.2d 193 (4th Cir. 1967).

Plaintiffs showed that the holds of the M/S WESTBULK, after their hatches were mechanically closed by the crew were unseaworthy, for lack of light and ventilation. The experts also established that the Appellants had a duty to inspect the hold before closing the hatches.

The Petitioners were in a better position than the respondent to avoid the accident; as a matter of fact only the shipowners by making an inspection before closing the hatches could have avoided the accident. Liability should fall upon the party that is best situated to adopt preventive measures and thereby reduce the likelihood of injury. The shipowners are liable, where, as here, the proximate cause of Mr. Alejandro Cerrich's death was the closing of the hatches without making an inspection. Caribe Shipping, the stevedore, was powerless to minimize the risk, the shipowners were not. *Italia, supra,* at 376 U.S. 324; *Ryan Stevedoring* v. *Pan-Atlantic Steamship Corp., supra; Southern Stevedoring & Contracting Co.* v. *Hellenic Lines Ltd.,* 388 F.2d 267 (5th Cir. 1968); *Cia. Maritima Del Nervion* v. *Flanagan Ship Corp.,* 308 F.2d 125 (5th Cir. 1962); *Waterman S/S Corp.* v. *Davis,* 353 F.2d 650 (5th Cir. 1965); *cert. den.,* 384 U.S. 972 (1965).

Based on the facts of this case, the shipowners would have been precluded by their own negligent actions and omissions from obtaining indemnity from the stevedoring contractor, even if the latter had in some way rendered a substandard performance. The jury properly found that the shipowners had been negligent and dismissed the

third-party complaint. The verdict is justified by a clear preponderance of the evidence and the judgment notwithstanding the verdict requested by shipowner should be denied, affirming the District Court on its finding to that effect.

III. THE SEVENTH AMENDMENT DEMANDED THAT THE CONTROVERSY IN THE INDEMNITY ACTION BE SUBMITTED TO THE JURY.

The decisional process to determine the question of indemnity is a balancing of responsibilities test. As stated in *Southern Stevedoring & Contracting Co.* v. *Hellenic Lines Ltd., supra,* 388 F.2d at 271:

> "The triers of facts must weigh the substantiality of the fault of the shipowner against the breach of warranty by the stevedore to determine whether the former's conduct is sufficient to preclude indemnity."

A useful decisional standard for the guidance of the courts engaged in such balancing was the one suggested by the *Italia* case, *supra,* 376 U.S. at 324:

> "Liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury."

It is a sound rule that the triers of facts be given the opportunity to perform the balancing test that is required for a just and proper adjudication of the indemnity action. *Atlantic & Gulf Stevedores, Inc.* v. *Skibs A/S Danmator,* 342 F. Supp. 837, at 845 and 846. (SD. Tx., 1971).

The court in the instant case properly submitted to the jury the issue of liability on the third-party action. The question of whether the stevedore performed his services

in a workmanlike fashion is a question for the jury, and due to the conflicting theories in this case, it could not be answered as a matter of law. The nature of the issues in the case, the factual variations in the evidence, the testimony of the foreman, of the other longshoremen, and of all the experts witnesses, all make the questions of the adequacy of the stevedore's performance of his work and of the shipowner's own conduct, a matter which was peculiarly for the jury to determine. Under the Seventh Amendment, these type of issues should be left to the jury's determination as was properly done by the Court in the instant case. *Johns* v. *N. V. Nederlandsch Amerikaansche S. M.*, 374 F.2d 189 (3rd Cir. 1967); *International Terminal* v. *N. V. Nederl. A.S.M.*, 393 U.S. 74, 89 S. Ct. 53, 21 L. Ed. 2d 58 (1968).

The matter of indemnity was properly submitted to the jury for its determination based on the conflicting theories of the parties and on the controverted issues of fact in this case. Even the Court of Appeals of the Second Circuit would have decided the issue in the same way. That circuit has decided that the issue of whether the shipowner "has been guilty of such conduct on its part as to foreclose indemnity" is essentially a question of fact and should be determined by a jury. *McNamara* v. *Weichsel Dampschefahrts, Ag*, 293 F.2d 900 at 901-902 (2d Cir. 1961); *Hurdich* v. *Eastman Shipping Corp.*, 503 F.2d 397, at 401 and Note 3, (2d Cir. 1974); *Santiago Martinez* v. *Compagnie General Transatlantique*, 517 F.2d 371 at 376 (1st Cir. 1975).

Conclusion

Petitioners request for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.

The question presented by Petitioners is of local application only to Puerto Rico and rooted on Commonwealth Statute, under Rule 19.1(b) of the Rules of this Court certiorari jurisdiction must be denied.

The issues and evidentiary matters submitted by petitioners to both courts below were properly decided after a review of the record and this Court should not enter into the same and analysis.

Respectfully submitted,

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